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# Champerty and Maintenance - Contracts and Transactions with Attorneys - Can an Attorney Recover on Quantum Meruit When His Contract of Retainer Is Champertous

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bastardize the child, and it advocates making blood grouping tests conclusive.

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CHAMPERTY AND MAINTENANCE — CONTRACTS AND TRANSACTIONS WITH ATTORNEYS — CAN AN ATTORNEY RECOVER ON QUANTUM MERUIT WHEN HIS CONTRACT OF RETAINER IS CHAMPERTOUS? — Plaintiff, an attorney, was retained by a corporation to prosecute an action for a tax refund. It was agreed plaintiff's fee was to be contingent and that he would bear the expense of paying an expert witness whose testimony was necessary for recovery. After plaintiff successfully prosecuted the action the client refused to pay his fee, asserting that the agreement for payment of the fee of the witness was champertous. The Second Circuit Courts of Appeals *held* that despite the champertous character of the express contract of retainer, plaintiff could recover the reasonable value of his services on the theory of quantum meruit. *Kamerman v. United States*, 278 F.2d 411 (2d Cir. 1960).

The decision is contrary to the position taken by the American Law Institute, which asserts that an attorney who performs services in pursuance of a champertous agreement can recover neither the compensation stipulated in his contract of retainer nor their reasonable value.[1] A substantial body of authority honors this point of view.[2] Nevertheless the more widely supported ruling is in accord with the instant decision and allows the attorney to recover on the basis of a quantum meruit count.[3] One writer suggests that the variation in result among the various jurisdictions may be due to "differences in the specific conduct of the attorneys seeking compensation."[4] Illustrative of the force of this suggestion is a Virginia court's refusal of recovery on the ground that what the attorney undertook to do was in itself illegal.[5]

Other courts have taken a middle ground and hold that the right of recovery on the basis of quantum meruit is present but that the void express contract of retainer cannot be considered for the purpose of determining the value of the services actually rendered,[6] except that it may be used to limit recovery to the amount set forth in the contract.[7] In some instances it has been stated that the contract is admissible in evidence for the purpose of in-

1. Restatement, Contracts § 545 (1932) "A person who has agreed to render services under a bargain, illegal under the rules stated in §§ 541, 542 [Champerty and Maintenance], cannot recover either the agreed compensation for his services or their reasonable value. Nor can he retain from the proceeds acquired by enforcing the claim even reasonable consideration."

2. Weil v. Neary, 278 U.S. 160 (1929); Merland v. National Metropolitan Bank, 84 F.2d 238 (D.D.C. 1936); Sapp v. Davids, 176 Ga. 265, 168 S.E. 62 (1933); Moreland v. Devenney, 72 Kan. 471, 83 Pac. 1097 (1905); Hinckley v. Giberson, 129 Me. 308, 151 Atl. 542 (1930).

3. Watkins v. Sedberry, 261 U.S. 571 (1923); Rogers v. Samples, 207 Ky. 150, 268 S.W. 799 (1925); *In re* Snyder, 190 N.Y. 66, 82 N.E. 742 (1907); Stearns v. Felker, 28 Wis. 594 (1871). See *In re* Joslyn, 223 F.2d 184 (7th Cir. 1955); Darnell v. Broken Bow, 139 Neb. 844, 299 N.W. 274 (1941).

4. See CORBIN, CONTRACTS § 1426 at 712 (1951).

5. Roller v. Murray, 112 Va. 780, 72 S.E. 665 (1911). See also Brush v. City of Carbondale, 229 Ill. 144, 82 N.E. 252, 255 (1907); Gammons v. Johnson, 69 Minn. 488, 72 N.W. 563, 564 (1897).

6. Elliot v. McClelland, 17 Ala. 206 (1850); Dorr v. Camden, 55 W.Va. 226, 46 S.E. 1014 (1904).

7. Hamilton v. Burgess, 233 Ala. 4, 170 So. 348 (1936); *cf.* Oxborough v. St. Martin, 169 Minn. 72, 210 N.W. 854 (1926). See Freerks v. Nurnberg, 33 N.D. 587, 157 N.W. 119, 121 (1916).

dicating the party's view as to the proper consideration.[8] Recovery has also been allowed on the basis of a quantum meruit theory, but limited to the value of services rendered before the void contract was made.[9]

The North Dakota Code is silent on the matter. But it has been held in this state that no recovery can be had in quantum meruit where the services cannot be shown to have benefited the client, the recovery being precluded where a champertous agreement provided for a contingent fee and the litigation failed.[10]

It is submittted that to allow recovery in cases of this type, as was done in the instant decision, is to encourage champertous agreements. If the client permits the illegal contract to stand, the attorney can recover the contractual amount. If the client does not, then the attorney can recover the reasonable value of his services. Such a result gives indirect sanction to an illegal agreement and thus encourages practitioners to "take a chance." Equally, it allows clients to exert economic pressure on practioners to finance their lawsuits.

THEODORE KESSEL, JR.

FALSE IMPRISONMENT — ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFORE — SHOPKEEPERS RESPONSIBILITY — NORTH DAKOTA'S SHOPLIFTING ACT. — Plaintiff was detained by the defendant's employee, who had observed him taking some caroid and charcoal tablets from a bottle in a drugstore. The defendant at that time was serving in the capacity of a store detective hired by the drugstore for the purpose of stopping shoplifters. The detention lasted 30 to 40 minutes, during which time the defendant questioned the plaintiff about his actions. The plaintiff brought this action for false arrest; at the trial the jury awarded the plaintiff damages in the amount of $1,500.00. On appeal, the supreme court of Nebraska *held*, two justices dissenting, that the damages were excessive, but there was sufficient evidence to submit the case to the jury. New trial granted. *Hebrick v. Samardick & Co.*, 169 Neb. 833, 101 N.W.2d 488 (1960).

False imprisonment is the unlawful restraint by one person of the physical liberty of another.[1] The detention is a matter between private persons for a private end.[2] Generally, probable cause[3] is not a defense in an action for false imprisonment.[4] However, some courts hold that probable cause will reduce damages.[5] It has been held that where a person has reasonable grounds to believe that another is stealing his property, he is justified to detain him for a reasonable time in order to investigate.[6]

8. See Davis v. Webber, 66 Ark. 190, 49 S.W. 322 (1899); Clark v. Gilbert, 26 N.Y. 279 (1863); *cf.* La Du-King Manuf'g Co. v. La Du, 36 Minn. 473, 31 N.W. 938 (1899).

9. Dreyfuss, Weil & Co. v. Jones, 116 Ill. App. 75 (1904); Thurston v. Percival, 50 Mass. (1 Pick.) 415 (1823).

10. Freerks v. Nurnberg, 33 N.D. 587, 157 N.W. 119 (1916).

1. Rich v. McInery, 103 Ala. 345, 15 So. 663 (1894); Weiler v. Herzfeld-Phillipson Co., 189 Wisc. 554, 208 N.W. 599 (1926).

2. Alsup v. Skaggs Drug Center, 203 Okla. 525, 223 P.2d 530 (1949).

3. Sanders v. Davis, 153 Ala. 375, 44 So. 979 (1907). "Probable cause" for arrest, as a defense to an action for false imprisonment, means a reasonable ground for suspicion, supported by circumstances.

4. Jefferson Dry Goods Co. v. Stoess, 304 Ky. 73, 199 S.W.2d 994 (1947); Titus v. Montgomery Ward & Co., 224 Mo. 177, 123 S.W.2d 574 (1939).

5. Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005 (1900); Crawford v. Huber, 215 Mich. 564, 184 N.W. 594 (1921); Titus v. Montgomery Ward & Co., 224 Mo. 177, 123 S.W.2d 574 (1939).

6. Collyer v. S. H. Kress Co., 5 Cal. 2d 175, 54 P.2d 20 (1936); Bettolo v. Safeway